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JAMES H. McKENNEY,
Clerk.

No. 110.

By. of Taggart, Simmons & Baker for Appts.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Jan. 9, 1902.

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WILLIAM H. BRAINARD, EDWARD ALBERT BRAINARD, EVA HANMORE, APPELLANTS,

vs.

LEFFERT L. BUCK AND JAMES COLEMAN.

Appeal from the Court of Appeals of the District of Columbia.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

This appeal is taken from an affirmance by the Court of Appeals of the District of Columbia of a decree, passed at a special term of the Supreme Court of said District, in an equity cause, wherein appellees are complainants and appellants are defendants, perpetually enjoining the appellants from prosecuting an action of ejectment for the recovery of an undivided part of the property described in the bill filed in the cause, and requiring the defendants to convey, quit-claim and release the same to complainant Buck within twenty days, in default of which the decree should operate and stand as such conveyance (Rec., pp. 76–77).

The pleadings consist of an original bill, filed April 15, 1898 (Rec., pp. 1–4), and Exhibits A, B and C (Rec., pp.

5–8); of a demurrer thereto (Rec., pp. 14, 15), which was sustained, with leave to amend (Rec., p. 15); of an amended bill (Rec., p. 16), and an additional Exhibit D (Rec., p. 20), and of a demurrer thereto (Rec., p. 21), which was overruled, with a requirement to answer within ten days (Rec., p. 22), and of an answer of the defendants (Rec., p. 22), and of a replication (Rec., p. 26).

The remainder of the Record consists of the depositions of witnesses on both sides, and of papers referred to therein or given in evidence. These papers are not placed in proper order in the Record, and in identifying them the same mark has been given to certain of them, which are of a different and distinct nature. What purports to be a copy of the will of Charles F. Brainard was marked "Exhibit A" (Rec., p. 5); an account from a book, which book was introduced as part of complainants' testimony, was marked also as "Exhibit A" (Rec., pp. 8, 9); and a number of other accounts from the same book were also marked "Exhibit A" (Rec., pp. 10–14); and still another account, entitled "Memd. of Basis for Settlement," was also marked "Complainant's Ex. A" (Rec., p. 73).

A stipulation was entered into by counsel in regard to the Record and exhibits, in which it was agreed, among other things, that the printing of the entire contents of the book above mentioned may be dispensed with and the book itself used at the hearing if necessary (Rec., p. 76).

STATEMENT OF THE CASE.

The history of the record title to the lot, in so far as it has any bearing upon the questions involved in the controversy, is as follows:

Charles H. Lindsley conveyed it to Charles F. Brainard, by deed in fee in the usual form, dated July 18, 1879, and

recorded the same day in Liber 920, at folio 249 of the land records, reciting a consideration paid by the grantee of $6,350.

Brainard and his wife, Cornelia A., conveyed it to John F. Waggaman and John Sherman in trust, by deed dated July 18, 1879, and recorded on the same day in Liber 920, at folio 251 of said land records. The deed recites that said Brainard is indebted to said Lindsley in the sum of $3,800, part of the purchase-money, for which said Brainard had made and delivered his three promissory notes of even date payable to said Lindsley's order in one, two and three years, with interest, and respectively for the sums of $1,266, $1,267 and $1,267, and recites that the conveyance is made to secure payment of the same by Brainard.

Waggaman and Sherman, trustees, reconveyed the premises to said Charles F. Brainard by deed dated July 25, 1879, and recorded on same day in Liber 917, at folio 476 of said records, releasing the trust. After referring to the trust, the deed states that the indebtedness secured thereby had been—

> "fully paid and satisfied by the party of the second part, the said Charles F. Brainard, as is evidenced by the signature of Charles H. Lindsley, the party secured"—

and that the notes had been canceled.

Charles H. Lindsley and wife again conveyed the lot in fee to said Brainard by deed dated July 23, 1879, and recorded on July 26, 1879, in Liber 918, at folio 357, of said records, for the consideration of $6,350 paid by grantee.

Brainard and wife conveyed the lot to John F. Waggaman and James A. Harban, in trust, by deed dated July 25, 1879, and recorded on July 26, 1879, in Liber 918, at folio 359 of said records. This deed recites that said Brainard is indebted to said Lindsley in the sum of $3,800, part of the purchase-money, for which said Brainard had made and delivered his three promissory notes of even date, each for the sum of $1,266.66, and payable to said Lindsley's order

in one, two and three years with interest, and recites that the conveyance is made to secure the payment of the same by Brainard.

Waggaman and Harban, trustees, reconveyed the premises to said Charles F. Brainard by deed dated September 17, 1880, and recorded on September 22, 1880, in Liber 945, at folio 451 of said records, releasing the trust. This deed, after referring to the deed of trust, states that the indebtedness secured thereby had been "fully paid and satisfied by the party of the second part, Charles F. Brainard."

Brainard and wife conveyed the lot to Edward S. Westcott and William W. Wetzell, trustees, by deed dated September 14, 1880, and recorded September 17, 1880, in Liber 949, at folio 405 of said records.

This deed recites that said Brainard had executed a bond to the Western Building Association, conditioned for the repayment in monthly instalments of advances made to him by the association, amounting to $2,520, and that the object of the deed is to secure such repayment by Brainard.

Westcott and Wetzell, trustees, executed to Charles F. Brainard, a deed of release of the trust, dated March 15, 1882, and recorded April 1, 1882, in Liber 1003, at folio 39 of said records. It was executed after the grantee's death

Upon the face of these deeds to Brainard no trust is declared and none can be implied for the benefit of any other person.

Brainard entered into possession of the lot upon the conveyance of the same to him by Charles H. Lindsley and occupied the same as his residence until his death, which took place May 13, 1881. He died without issue, and his heirs at law were his three brothers and two sisters. Appellant William H. Brainard is one of the brothers, and appellant Edward Albert Brainard, an infant, is the only child and heir of another brother, since deceased, and of whom appellant Eva Hanmore is the widow. All of the heirs were non-residents of the District at the time of

Charles F. Brainard's death, and have since been non-residents. Cornelia A. Brainard, the widow of Charles F. Brainard, occupied the property until her death, which took place March 31, 1892. Her brother Buck, appellee, has since rented it and collected the rents and applied them to his own use. The appellee Coleman has occupied it for several years as lessee of Buck, and has attorned to him as such.

In this condition of the record title, and on July 26, 1897, William H. Brainard, as one of the heirs of his late brother, Charles F. Brainard, brought ejectment against Coleman for an undivided interest in the lot. After issue was joined and the case calendared for trial, the original bill in the present case was exhibited by appellees, Buck and Coleman, against appellants, praying that they be perpetually enjoined from prosecuting the ejectment suit—

> "And that it may be declared that the said lands are charged with a trust in favor of and ought to be held for the use and benefit of the said plaintiff, Leffert L. Buck, and that the said defendants, or so many and such of them as shall appear to have the legal title to said lands may be decreed to convey such legal title free of all incumbrances done or suffered by them or any or either of them," etc., (Rec., p. 4).

Averments of Fact in the Original Bill.

Complainant Buck bases his right to the relief sought, and the case made by the bill which is sworn to by Buck depends upon, the averments of fact in paragraph 8 thereof (Rec., pp. 2, 3), which are in substance as follows:

That he was the brother of Cornelia A. Brainard, the wife of Charles F. Brainard; that said Brainard was a clerk in the Treasury Department, with little or no means of support other than his salary; that he, Buck, "being willing to aid and assist his sister, and being *solicited* by her and

her husband to do so, *furnished and advanced the money to pay for the said property;" that it was advanced partly to Brainard, partly to his wife and partly in taking up and paying off incumbrances.*

That—

> "*said money was so advanced and said property purchased for the sole and only purpose of giving to the said Cornelia A. Brainard a home,* and that it was *so understood* by the said Brainard at the time of said purchase."

That—

> "*the said property was conveyed to the said Brainard instead of to his wife,* for the reason that prior to said conveyance the said Brainard had executed his will, by which said will he had devised and bequeathed to his said wife all his property of every kind, and it was understood by the said Brainard and his wife that if she should survive him the property would descend to her, and in the event she should not survive him, her said husband, she would have a home on said property during her lifetime, and that during said period said Brainard should hold the title to said property as trustee for said Leffert L. Buck."

A trust created by express agreement of the parties by parol, is thus alleged, which the court is asked to establish and enforce in contravention of the Statute of Frauds (Abert's Comp. Laws of D. C., p. 231, Secs. 8, 9).

In the eighth paragraph it is averred that after the death of her husband, and until her own death in 1892, Mrs. Brainard occupied the property; in the ninth paragraph it is averred that by deed dated March 31, 1882 (about ten months after her husband's death), and "in anticipation" of her own death (which did not happen until ten years thereafter), she conveyed the lot to said Buck, who thereupon "entered into possession of, and has ever since remained in possession of, the same."

This deed from Mrs. Brainard to Buck, executed 16 years before, but not recorded, is filed as an exhibit to the bill (Rec., p. 7). The consideration stated in it is $6,350, paid by Buck to her.

Demurrer to Original Bill.

To the bill a demurrer was interposed upon the ground that the alleged agreement was void under the Statute of Frauds, because not reduced to writing, and upon the ground of *laches*, and it was sustained with leave to complainants to amend "as they may be advised" (Rec., 14, 15.)

Under the circumstances, nothing was available by way of amendment but the insertion of an averment that the alleged agreement *was* manifested by a writing, and an explanation of the delay in seeking relief, or perhaps, averments of new and repugnant facts coupled with a showing that in respect of the original averments complainant was mistaken or had been misinformed; we say "perhaps" for the reason that the only averment made in the original bill upon information and belief is in paragraph 9 and has relation solely to those comprising the next of kin of Charles F. Brainard.

An amended bill was filed, however, (Rec, p. 16), in which neither of said averments was inserted, and in which there is a complete and absolute change in the facts averred, as grounds for relief, without any explanation whatever as to the reasons for such change; those set forth in the original bill are entirely abandoned and ignored, and a different state of facts altogether is set up—facts which are utterly and radically inconsistent with those stated in the original bill, and which clearly constitute a new and different case from that made by the original bill.

Averments of the Amended Bill.

In this amended bill, complainant Buck bases his right to the relief sought, and the case made by it depends upon,

the averments in paragraphs 9 and 10 thereof (Rec., pp. 17, 18), which are as follows:

(*a*) "That from March 12, 1875, until June 3, 1880," he sent to Brainard as his "*agent*" various sums of money, the dates and amounts of which are stated in exhibit D. (This exhibit is on page 20 of the Record, and foots up a total of $7,857.04, and it may be here stated that no attempt was made in the proof to establish its correctness.)

(*b*) That he, Buck—

> "*authorized* the said Charles F. Brainard, *as agent for him, the said Leffert L. Buck*, to invest the same in real-estate bonds and securities in the city of Washington."

(*c*) That—

> "on or about the 18th day of July, 1879, the said Charles F. Brainard purchased the said property . . . for the sum of $6,350, and paid on said purchase-price the sum of $2,550 out of the moneys so sent him for investment."

(*d*) "That upon said purchase the said Charles F. Brainard *took the deed of said property to himself without the knowledge, consent or authority*"

of him, said Buck.

(*e*) That on July 25, 1879, the said Brainard executed to Waggaman and Harban, trustees, a deed of trust on the property to secure the balance of the purchase money.

(*f*) That thereafter and on or about March 12, 1880, the said Brainard made a further payment of $1,266.66 on the property out of said moneys so sent him for investment;

> "*and that said deed of trust was executed without the knowledge, consent or authority* of the said plaintiff, Leffert L. Buck."

(*g*) That on the 8th day of June, 1880, "and before his death," Brainard made further payments on said property not exceeding in amount $650 out of said moneys.

(*h*) That after the death of Brainard his wife informed Buck that she held the legal title to the property under the will of her husband, and that there was unpaid upon the trust deed the sum of $1,971.81; that he, Buck, paid this balance, and that thereupon she executed the deed dated March 21, 1882, above mentioned, conveying the property to him, Buck, and—

> "on said day Buck entered into and has ever since remained in undisturbed possession of said premises."

Demurrer to Amended Bill.

A demurrer was interposed to the amended bill, one of the grounds of which was that complainants had set up a new and a different cause of action from the one alleged in the original bill; another of the grounds was *laches* on the part of complainants (Rec., p. 21).

This demurrer was overruled and defendants were required to answer within ten days.

Answer to Amended Bill.

Appellants thereupon answered specifically, denying the above-mentioned allegations of the amended bill as to Charles F. Brainard's lack of pecuniary resources, and otherwise; and averring that said Brainard had been in the receipt of a large salary, $1,800 per annum, as a clerk in the Treasury Department, from the year 1867 until the time of his death; they aver that said Brainard bought the property, paying part of the purchase-money with his own funds; that he executed and delivered his promissory notes for the residue, and that he and his wife executed a deed of trust upon the property to secure the said notes; and that on the loan made to him by the building association he made repayments monthly of $36 until the time of his death; that said Brainard bought the property and took the title thereto on his own account

and for his own use, and that Buck had no legal or equitable interest in it (Rec., pp. 22–25).

Testimony was taken on both sides under the amended bill, upon which the court below passed the decree from which the appeal was taken to the Court of Appeals.

ASSIGNMENT OF ERRORS.

1. The Court of Appeals erred in not remanding the cause to the Supreme Court of the District of Columbia with directions to vacate the order overruling the demurrer of appellants to the amended bill and to dismiss said bill.

2. The Court of Appeals erred in affirming the decree of the Supreme Court of the District of Columbia and in not remanding the cause to said court with directions to dismiss the bill.

3. If the appellee is entitled to any relief under the amended bill the testimony fails to sustain the claim made to the whole property, and at most establishes his right to a decree for an accounting between the parties and an equitable lien for such sum as may be found due him, or to an undivided moiety of the property, and to an accounting between the parties in regard thereto, and in this view the Court of Appeals erred in not remanding the cause with instructions to vacate said decree, and to pass a decree adjusting accordingly the rights of the parties.

ARGUMENT.

The First Assignment of Error.

The amended bill was filed without authority other than the general leave to amend and without notice to the defendants. The objections to it could only be urged under the

circumstances in one of two ways—by a motion to strike it out or by a demurrer thereto.

The latter course was adopted. The question might well be raised by demurrer.

> Insurance Co. *vs.* Bahnke, 4 App. D. C. 371, 378.
> Ogden *vs.* Moore, 95 Mich. 293.
> 1 Daniel's Chancery Practice (4th Ed.), 583.

The demurrer to the amended bill should have been sustained. It is impossible for the original and amended bills, both of which are sworn to by complainant Buck, to stand together because of irreconcilable inconsistency between them. The amended bill sets up a different state of facts, and is based upon a different theory as to the relief prayed from those urged in the original bill.

Contrasting the two bills with respect to material averments we have the following results:

In the amended bill the averment of the original is repeated, that Buck was a brother of Cornelia A., the wife of Charles F. Brainard, who was a clerk in the Treasury Department, and had "little or no means of support outside of the salary" which he received as such clerk (par. 9, Rec., p. 12). Except as to this the divergence is complete.

In the original bill it is alleged that because of the slender resources of Brainard he, Buck, was willing "to aid and assist his sister," and that being *solicited* by her and her husband, to do so, he had furnished and advanced the money to pay for the property, and that—

> "*said money was so advanced and said property purchased, for the sole and only purpose* of giving to the said Cornelia A. Brainard a home,"

and "*that the property was conveyed to the said Brainard, instead of to his wife*" because it was understood by the husband and wife, that under the will of the husband the property would go to her if she survived him (par. 8, Rec., pp. 2, 3).

These averments are pointed to the effect that he, Buck, was fully aware of the execution of the deed to Brainard

and of the reasons therefor and of every circumstance connected with it, and of every step taken by Brainard and his wife, in the acquisition of the property, and that he did not forbid, object to or question the propriety of anything they did in the premises, but fully assented to the same; and that he did not consider and did not claim that any act of theirs in the premises was done or performed in bad faith or involved any fraud upon him.

He could have used no other form of words by which his admissions and concessions in these respects might have been made more clear; yet under color of amendment he suppresses and ignores these averments, and substitutes for them others (par. 9, Rec., p. 17), which are totally at variance with them, the substance of which is given on pages 7, 8 and 9 of this brief.

The new position taken by him is that he sent moneys to Brainard as his "*agent*" and "*authorized*" Brainard "*as agent for him, said Leffert L. Buck,*" to invest the same in obligations secured upon real estate; that Brainard purchased the property for the sum of $6,350 and paid on the purchase $2,550 in cash out of moneys so sent him by Buck for investment; "*that Brainard took the deed of said property to himself without the knowledge, consent or authority*" of him, said Buck; and that Brainard and his wife executed the deed of trust to secure the balance of the purchase-money, also "*without the knowledge, consent or authority*" of him, said Buck; and hence, as the court must infer, that Brainard had acted in bad faith and that the transaction was consummated in fraud of his (Buck's) rights in the premises.

Manifestly the averments of both bills, as to the circumstances attending the acquisition of the property can not be true. The authorities are unanimous that a bill so amended can not stand, and that it should be dismissed.

In the case of Marble *vs.* Bonhotel, 35 Ill. 248, the court, after stating that the verification of the bill by oath does not necessarily deprive the complainant of the benefit of an amendment, says:

"It is, however, no doubt true that he is estopped from so amending his bill *as to contradict facts which he has sworn to be positively true*, unless he can clearly show the court that such statements were made in mistake."

The complainant Buck evidently knew that he could not make such showing, for he did not attempt to do so.

"The amendments made to sworn bills must be consistent with the original bill; and they must be made without striking out or departing from the allegations in the original bill."

1 Daniel's Ch. Pr. & Pl., Sec. 404, note 1.

"The rule is well settled that matter which constitutes a new bill, or matter inconsistent with or repugnant to the substantive allegations of the original bill, can not be introduced by amendment. Jennison's Ch. Pr. & Pl. 97; Daniel's Ch. Pr. & Pl. (5th Ed.) 402, Sec. 8, note 8; 1 Barber's Ch. Pr. 207; Freeman *vs.* Banks, Har. Ch. 311.

"The amendment is regarded as a continuation of the orginal bill, and as forming part of it; both constitute but one record. Daniel's Ch. Pl. & Pr. 402; Munch *vs.* Shabel, 37 Mich. 166. The bill therefore embraces two inconsistent theories based upon inconsistent and repugnant averments. The order of the court must be reversed," etc.

Ogden *vs.* Moore, 95 Mich. 293.

"Where an amended bill is sought to be filed which is based upon allegations contradicting those in the prior bill, these allegations being of substantial and basal facts, it seems to us that the court may properly refuse to allow it to be filed. The bill is not stating new and additional facts; it is not alleging in a fuller or different way facts hitherto averred; it is not an amended bill, but a bill contradicting the basis upon which the complainant sought to proceed."

Mr. Justice Brewer in Nat. Met. Bank *vs.* Dispatch Co., 38 Fed. Rep. 58.

> "While amendments to a bill in chancery are liberally allowed, as to parties, prayer for relief, and as to substance germane to and in enlargement or explanatory of the substantial parts of the bill, on which the relief prayed for is predicated, the orator is never allowed by amendment to bring upon the record new matter *repugnant to or inconsistent with* that set forth in the bill, nor substantially to make a new bill. Barnes *vs.* Grunzeback, 1 Ed. Ch. 49; Daniel's Ch. Pr. & Pl. 469 and notes."
>
> Hill *vs.* Hill, 52 Vt. 582.

This court in Shields *vs.* Barrow, 17 How. 120, announces the rule in the following terms:

> "Nor is a complainant at liberty to abandon the entire case made by his bill, and make a new and different case by way of amendment. We apprehend that the true rule on this subject is laid down by the vice chancellor in Verplank *vs.* The Mercantile Ins. Co., 1 Ed. Ch. 46. Under privilege of amending a party is not to be permitted to make a new bill. Amendments can only be allowed where the bill is found defective in proper parties, in the prayer for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself, or for putting in issue new matter to meet allegations in the answer. See, also the authorities there referred to and Story's Eq. Pleading, 884."

The issues of fact arising upon the original bill in the case at bar are—

1. Whether Charles F. Brainard agreed with complainant Buck, as averred, that the property should be purchased by Buck, and the title taken in Brainard's name in trust for Mrs. Brainard for life, with remainder to said Buck.

2. Whether, as averred, the said Buck advanced the entire purchase-money with that understanding.

The facts were clear, but even if true, relief could not be

granted, because there was no memorandum in writing signed by Brainard or by some one for him evincing such understanding.

The issues of fact arising upon the amended bill are—

1. Whether said Buck placed moneys in the hands of said Brainard as his agent for investment in bonds, etc.—secured upon real estate—prior to the purchase of the lot.

2. If so, whether said Brainard invested the same in the purchase of the lot, taking the title in his own name, without the consent or knowledge of said Buck, and with intent to defraud said Buck, and how much was invested in said lot under such conditions.

The two sets of issues are entirely different from and contradictory of each other; the variance is so pronounced that the bills can not stand together, as parts of the same pleading.

The case was otherwise in Jones *vs.* Van Doren, 130 U. S. 684, 690, referred to in the opinion of the Court of Appeals (Rec., p. 81), in support of the position that the bills in the present case were not repugnant.

In Jones *vs.* Van Doren Mr. Justice Gray, in delivering the opinion of the court, said:

> "The only difference between the original and amended bills is, that the first alleges that the defendant Jones took the conveyance of the plaintiff's right of dower upon express trust for her, whereas the second alleges that he procured the conveyance from her by fraudulent misrepresentation as to the nature of the instrument, creating a trust by operation of law in her favor. The other allegations of the bills are substantially identical."

The authorities above cited and relied upon by appellants are conclusive to the point, that such amendments as those in the present case ought not to be permitted, for to

> "While amendments to a bill in chancery are liberally allowed, as to parties, prayer for relief, and as to substance germane to and in enlargement or explanatory of the substantial parts of the bill, on which the relief prayed for is predicated, the orator is never allowed by amendment to bring upon the record new matter *repugnant to or inconsistent with* that set forth in the bill, nor substantially to make a new bill. Barnes *vs.* Grunzeback, 1 Ed. Ch. 49; Daniel's Ch. Pr. & Pl. 469 and notes."
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The facts were clear, but even if true, relief could not be

granted, because there was no memorandum in writing signed by Brainard or by some one for him evincing such understanding.

The issues of fact arising upon the amended bill are—

1. Whether said Buck placed moneys in the hands of said Brainard as his agent for investment in bonds, etc.—secured upon real estate—prior to the purchase of the lot.

2. If so, whether said Brainard invested the same in the purchase of the lot, taking the title in his own name, without the consent or knowledge of said Buck, and with intent to defraud said Buck, and how much was invested in said lot under such conditions.

The two sets of issues are entirely different from and contradictory of each other; the variance is so pronounced that the bills can not stand together, as parts of the same pleading.

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The authorities above cited and relied upon by appellants are conclusive to the point, that such amendments as those in the present case ought not to be permitted, for to

do so would be to allow a complainant TO SWEAR POSITIVELY IN HIS BILL TO CERTAIN ALLEGATIONS OF FACT AS TRUE, AND BY AMENDMENT TO SWEAR POSITIVELY THAT THE FORMER STATEMENTS WERE FALSE. He is estopped from attempting the contradiction.

The Second Assignment of Error.

The relief prayed should have been denied on the proofs, and the suit dismissed, and the Court of Appeals should have so held.

The original and amended bills are sworn to by complainant Buck. He was the only witness examined in chief in his own behalf; and although he was as well and as fully informed in the premises when he swore to one state of facts in his original bill as he was when he swore to another and an inconsistent state of facts in his amended bill, and as he was when he was sworn as a witness in his own behalf, testified before the examiner, nevertheless his deposition not only fails to sustain the averments of fact in either bill, but makes out a case which is clearly a different one from that made in either. This is not permissible.

"A party is not allowed to state one case in a bill or answer and to make out a different one by proof."

Bone *vs.* Child, 10 Pet. 179.

Henry *vs.* Suttle, 42 Fed. R. 94.

In his testimony he states (Rec., p. 28):

> "About 1878, as I had no settled home, *I suggested to him that we should buy a house together* in Washington, for my part as headquarters, and to be a home for himself and wife. . . . *After we had talked about several different houses, we finally decided to buy the house at 1632 Rhode Island avenue,* which Mr. Brainard wrote to me could be obtained for $6,350. . . . I replied *that if he was satisfied the house was worth the money, and would be a pleasant place to live, he should buy it—I to pay one-half; he the other half.*"

There is no averment in either bill which this statement proves. It certainly does not sustain the one made in the original bill, that he "furnished and advanced" the money for the purchase of the property at the request of Mr. and Mrs. Brainard "solely for the purpose of providing a home" for the latter, the purchase of which he left to them, and the deed to be taken in the name of Brainard in accordance with an understanding and agreement between all parties. Nor does it support the averment made in the amended bill, that he had entrusted Brainard with money, as his agent, for investment in one manner, and that Brainard had fraudulently misappropriated it by applying it to his (Brainard's) own purposes in the purchase of the property in his own name, without his (Buck's) "*knowledge, consent or authority.*"

Certain entries in the account rendered by Brainard to Buck (complainant's Exhibit A, "Memd. of Basis of Settlement,") which was given in evidence by Buck indicate necessarily that the deed to Brainard was taken with Buck's full knowledge and consent and approbation.

The entries referred to are as follows (Rec., p. 74):

I have paid interest, taxes, etc., during the last year ending September 4, '80...	$361 10
L. L. Buck paid during the same time...	63 75
	$424 85

The $63.75 he itemized (Rec., p. 76) as follows:

Insurance	$30 00
Deed	1 50
Repairing cellar	32 25
	$63 75

By referring to Brainard's book it will be seen that the first two of the entries were made on July 18, 1879, the date of the deed to Brainard. The inference is irresistible that

Buck made two payments in person; and Buck's own testimony corroborates the inference (Rec., p. 60):

> "Q. You may state whether you *personally* took any part in the purchase of this property?
> "A. In the bargaining?
> "Q. In the bargaining.
> "A. No."

The reasonable conclusion from the manner of this answer is that he did personally take part in the acquisition of the property in some other way, such as the recording of the deed and the payment of the insurance.

He (Buck) then proceeds (Rec., p. 29):

> "When we agreed to buy the house together, I supposed it would be in the name of both. *Along early in 1880 I learned that the property had been bought in his name alone. In the summer of 1880 I spoke to him about it*, and told him that if he would transfer *the property to me, in my name, I would pay for the balance*, and that he could have it for his home. *He did not wish to transfer the property to me. I understood—in fact, he told me*—that when he recovered (he was sick at the time) that he would be able to go on and pay the balance on the house, *and would be able to pay me for my part of it*, and own it in his own name, and he thought that would be better than to go to the expense of two transfers."

He claims that Brainard was sick in the summer of 1880, and that he (Buck) assented to this on that account, yet the evidence shows that Brainard performed the services required of him by the Government for a whole year after that date; that in fact he was not absent from his work and drew his salary regularly, as shown by the accounts kept by him up to within ten days of his death, when he was suddenly stricken with paralysis.

Was the language of Buck to Brainard, at the time of the suggestion by him to Brainard of a transfer of the property, that of a man speaking to his agent, with reference to prop-

erty fraudulently bought in the agent's name, with the money of his principal, as averred in the amended bill? Surely not. Nor is the reply imputed to Brainard such as might have been expected from a man conscious of such wrongdoing as Buck imputes to him. In any event, the testimony, if true, establishes the fact that the property was bought on the joint account of Brainard and Buck, and that they had an equal interest in the title, which is in flat contradiction of the averments of the amended bill. By the latter, as we have seen, Brainard is charged with fraud and excluded from any beneficial interest whatever in the property.

Even if they agreed to buy the property together, each to pay equally and each to own one-half, and the fact was established (which it has not been) that at various times Buck's money had been used to pay all the purchase money he would not be entitled to have the entire property, but only one-half of it, and an accounting with a lien for the balance due him.

Dickson *vs.* Patterson, 160 U. S. 584.

Furthermore, even if it be assumed, as averred in the bill, that Brainard was originally a wrongdoer, and had been guilty of fraud or deception in the acquisition of the property (which is nowhere apparent in the record from any credible evidence), it is nevertheless clear from Buck's testimony that he had agreed to treat the transaction as a binding one; with the option to affirm or repudiate, he concluded to let it stand.

> "Transactions although impeachable in equity at the time of inception, and for some time afterwards, on the ground of fraud, may become unimpeachable by a subsequent confirmation, by acquiescence, or by mere lapse of time."

Ker on Fraud and Mistake, 296.

On cross-examination, after testifying (Rec., p. 24) that it was understood between Brainard and himself that Brainard was to invest his money "in interest-bearing securities," Buck further testified that at the interview between him and Brainard in the summer of 1880, after he, Buck, had learned that the title to the property was in Brainard's name, Brainard said he—

> "would like to keep the property in his own name, and if he recovered he would like to pay for it, and pay me for my share.
>
> Q. You agreed to that, did you?
>
> A. *Yes.* We were doing everything we could to help him recover his health if possible.

After this interview, whatever they may have been before, the relations of Brainard and Buck were those of debtor and creditor; for there was not only acquiescence in, but confirmation, with full knowledge on his part, of the acts which he alleges as affecting his rights.

> "The doctrine of acquiescence applies as between trustee and *cestui que trust*, even in cases of express trusts."
>
> Ker on Fraud and Mistake, 303.

> "But as soon as a man with full knowledge of his rights . . . and of all the material circumstances of the case freely and advisedly does anything which amounts to the recognition of the transaction, or acts in a manner inconsistent with its repudiation . . . there is acquiescence, and the transaction, though originally impeachable, becomes unimpeachable in equity."
>
> Ibid, 302.

All the parties concerned in or having any knowledge of the transactions are dead, save Buck alone. In his effort to enforce alleged obligations of the dead his averments of fact in his pleadings in regard to such obligations should be

clear and consistent and his testimony in support of them should be clear and consistent with them; if not he must take the risk of presumptions against him.

Crosby *vs.* Buchanan, 23 Wall. U. S. 420.

The tergiversations of complainant Buck, in his written and oral statements under oath, are of such a character as to preclude the acceptance of any fact as true which is dependent merely upon his testimony for its establishment, and which is adverse to the defendants. He has absolutely destroyed his credit as a witness, except in respect of such matters as are otherwise proved, or are admitted or involve declarations against his interest.

The showing above, we submit, is amply sufficient to justify this criticism, but there are other features of his statements which may be referred to as further demonstrating the unreliability of his memory, and the ease and facility with which in a brief space of time he can involve himself in contradictions under oath.

He states (Rec., pp. 27, 28) that he went to Peru about March, 12, 1875; that he then had a little money which he requested Mr. Brainard to take and invest for him, telling him that from time to time, as he, Buck, had money to invest, he would send it to him, Brainard, for that purpose; that he, Buck, returned from Peru about April of 1876; that before starting for Peru he sent Brainard $200; that upon his return he sent Brainard money, as he had it "to invest as usual;" he further says (Rec., bottom of pp. 31, 32):

> "I did not keep any account of the money I sent him; he gave me a statement of the account, copied from the book. . . . As I had not any account, and did not keep any account of it, I have not sufficient recollection to say" [*i. e.*, whether, as appears from the context, the account (complainant's Exh. A, Rec. pp. 75) given him by Brainard was correct].

In his amended bill he swears that the account Exhibit D (Rec., p. 20), footing up $7,857.04, is a correct one of moneys sent Brainard; yet the account which he says Brainard gave him, and upon which he says he is entirely dependent for information, aggregates only $4,742.36; and shows that the amount Brainard received on March 12, 1875, from him was $220, and that two years and eight months elapsed before he sent Brainard a further sum, and that this further sum was $200 only.

He states that when he suggested to Brainard, in the summer of 1880, that the property be conveyed to him, and Brainard declined, Brainard said (Rec., p. 29)—

> "that in any event, if he was taken away, the property would go to his wife—all he had," etc.
> "Q. Do you remember anything about a will?
> "A. I do not remember anything about a will, *except I have the impression*, as I believe I stated before, that he said whatever property he had would go to his wife."

In the original bill he swears (Rec., pp. 3, 4) that the reason the property was conveyed to Brainard "instead of to his wife" was that Brainard had executed a will devising to her all his property. In the amended bill he pretends that he knew nothing of the deed to Brainard, and avers (par. 10, Rec., p. 18) that he first heard of the will when his sister, after the death of her husband, informed him that "she held the legal title to the property" under it.

It may be here remarked that although it is averred in the fourth paragraph of the amended bill that Brainard executed a will in 1872, and that the answer does not admit the fact but demands proof of it, there is not a scintilla of such proof in the record.

Again—prior to the filing of the original bill, and on February 12, 1898, he wrote Mrs. Farrar, one of the heirs of Charles F. Brainard (Rec., pp. 54, 55), as follows:

"Owing to your brother Frederick's ill-health, he never made any payment on the Washington house. All the payments were made by me. *Although the deed was taken by him, he understood, as I did, that it would pass by his will.*"

This letter alone is sufficient, as matter of evidence, to demonstrate that the position taken by him in his amended bill is unfounded, and to demolish it completely.

Other than Buck's deposition, the only evidence offered in support of the amended bill is the statement said to be in Brainard's handwriting, and to have been given to him by Brainard, and entitled "Memd. of Basis of Settlement" (Rec., p. 73), and the accounts (Rec., p. 8–14) from the book said to have been found among Brainard's effects after his death. They are inclusive as evidence in support of, and in fact they tend to disprove the averments of both bills.

Buck states that he heard of the taking of the deed in Brainard's name early in 1880 (Rec., p. 29); that he spoke to him about it in the summer of that year (Ibid.), and said to Brainard that if the latter would convey the property to him he (Buck) would pay the balance of the purchase money, and that Brainard declined to do this, saying that he would be able to pay Buck and pay for the property; later, and in the fall of the same year, desiring to relieve himself of his indebtedness to an amount equal to one-half of the value of the house, he, Brainard, proposed in the "Memd. of Basis for Settlement" (Rec., p. 73) to convey a one half interest in the house to Buck. From this nothing appears to indicate that Brainard and Buck stood in any other relation to each other than the ordinary one of debtor and creditor.

Defendant William H. Brainard testified that before the purchase of the house, his brother stated that as soon as he could find one to suit him, he intended to buy it (Rec., p. 47); and that after its purchase he always spoke of it as his own

house. The "Memd. for Basis of Settlement" negatives the idea that Brainard had previously regarded Buck as having any interest in the property. The memorandum was made between September 4 and September 16, 1880, for the former date is mentioned in the memorandum itself, and the latter date is the first date in the account entitled "C. F. Brainard, ac. ½ Property 1632 R. I. Ave." (Rec., p. 12), the opening and keeping of which was evidently based on the idea on Brainard's part that thereafter the property was to be considered as joint property. The fact that prior to September, 1880, Brainard considered himself as alone the owner of the property is strongly, we might say conclusively, shown by the account entitled "No. 1632 R. I. Ave. House, Repairs, &c." (Rec. p. 11), in which payment is shown out of Brainard's funds of $133, $88.67 and $25.34, on January 26, March 12 and May 25, 1880, respectively, for interest on the purchase-money notes; while after the proposition of Brainard to settle his indebtedness to Buck by conveying to him a half-interest in the property, he enters under date of September 16, 1880, in the account "C. F. Brainard, ac. ½ Property 1632 R. I. Ave." the item of $26.10 for interest, paid out of his own funds, on the purchase-money notes.

In regard to the account "Leffert L. Buck, Cr.," and "Leffert L. Buck, Dr.," it is evident upon the face of it and from the expert testimony that it was not kept according to the requirements of a system of scientific bookkeeping, and that the only office intended by Brainard for the entries was that of a memorandum of the amounts received by him from Buck, and of the actual disposition made of such moneys.

No moneys of Buck came into Brainard's hands after June 3, 1880, and if the "Basis for Settlement" be admissible at all, it must be accepted as a correct statement of the pecuniary relations between Brainard and Buck at the time it was made out, in September, 1880, and is the equivalent

of an express declaration by Brainard to Buck in the following terms:

> "I am indebted to you at this date in the sum of $3,816.16 on account of moneys of yours, and which I used in paying for the house, which I bought not on your account alone nor on our joint account, but on my own account solely. I propose to settle my debt to you by conveying a one-half interest in the property to you for $3,175.00, and to give you my note for the difference, $641.66, less some proper offsets for board for you and Nellie."

It is evident on the face of this proposition to settle, that it was made after September 4, 1880. Buck does not impeach the correctness of the account; he has in fact no account of his own independent of it (Rec., p. 32), and he puts it in evidence and relies upon it.

The settlement proposed was to the advantage of Buck. He testifies that during the previous summer he suggested to Brainard to convey the whole property to him and he would pay off the balance due upon it, and that Brainard did not accede to the suggestion, saying that he would be able to pay Buck for his half of it, and the expense of two transfers be thus avoided (Rec., p. 29); and that he, Buck, agreed to this (Rec., p. 35). This agreement gave him nothing as security for Brainard's whole debt to him, but Brainard's personal obligation, while the proposition for settlement gave him absolutely an undivided one-half interest in the property, of the value of $3,175, with a personal obligation of Brainard for the small remainder of the debt only.

In view of this and of the fact that Buck does not deny its acceptance, and of Brainard's subsequent action there can be no doubt that the proposition was accepted, and that a new agreement was entered into upon its terms. Brainard pays at once out of his own funds $26.10 accrued interest to the time, on the existing debt; he obtains a loan of $2,520 from the Western Building Association, to be repaid in

monthly instalments, and on September 14, 1880, he and his wife execute a trust upon the property to secure it; the unmatured debt upon it is paid off and released; and from that time on and until the date of his death Brainard makes out of his own funds the monthly return payments, which were continued by his wife, and amounted to $826.35 (Rec., pp. 12, 13).

In either case, and whether Brainard be considered at the time of his death as the owner of the whole property, and his indebtedness to Buck be considered as the whole amount of the advances made to him by Buck, or whether Buck be considered as the equitable owner of an undivided half of the property and his indebtedness to Buck be considered as simply the balance of the advances, less $3,175, the value of one-half of the property, it is clear that Buck might have collected every dollar due him by seasonable action.

What Brainard's complete assets were at the time of his death does not appear; his receipts from salary and sources other than Buck, for one year and eight months were upwards of $4,300 (Rec., pp. 8, 9); but it does certainly appear that he, Brainard, did not die insolvent, as alleged; he had $1,000 to his credit in bank (Rec., pp. 42, 46); he had from $1,500 to $2,000 worth of furniture (Rec., p. 41), as testified by appellant W. H. Brainard, and not denied—amounting in all to upwards of $2,500; and he had the house subject to the balance due the building association, assets more than sufficient to settle every dollar of Brainard's indebtedness to him. He did not see fit to enforce the payment, but allowed the assets to be dissipated, except the household furniture and effects, which he took after Mr. Brainard's death, and now, after he has had the benefit of the use and of the rents of the property for seventeen years (and any indebtedness of Brainard at the time of his death has been doubly paid in such rents), he asks in his amended bill that Brainard be convicted of fraud upon him, and that the property be decreed as his absolutely.

The case is without a scintilla of credible evidence, as we have seen, to show that Brainard held the money of Buck, as an agent, and with any limitations upon his right to invest it on his own account. No fraud in the transaction being shown, is the mere fact that he saw fit to buy the property on his own account and to use a part of the money in making the cash payment, giving his own notes to secure the remainder, sufficient to raise a resulting trust?

The authorities are clearly to the contrary, even in a case where the money is advanced expressly for the purpose of being used in paying part of the purchase-money. It is said:

> "The principle is that the whole consideration for the whole estate or for the moiety or third or some other definite part of the whole must be paid to be the foundation of a resulting trust; and that the contribution or payment of a sum of money generally for the estate, when such payment does not constitute the whole consideration, does not raise a trust by operation of law for him who pays it; and the reason for the distinction obviously is that neither the entire interest in the whole estate, nor in any given part of it, could result from such payment to the party who makes it, without injustice to the grantee by whom the residue of the consideration is contributed."
>
> White *vs.* Carpenter, 2 Paige Ch, 241.

> "To establish a resulting trust in lands in favor of the person who advanced the purchase-money, while the title was taken in the name of another, it must shown that the consideration moved from him in the first instance, and as a part of the original transaction; that he furnished the purchase money if money was paid, or other things of value which constituted the consideration, or that the credit, if credit was given, was extended to him."
>
> Bibb *vs.* Hunter, 79 Ala. 352.

"When a part of the purchase money is paid by one, and the whole title is taken by another a resulting trust *pro tanto* may under some circumstances be created. But in the latter case we believe it to be well settled that the part of the purchase-money paid by him in whose favor the resulting trust is sought to be enforced, must be shown to have been paid for some specific part or distinct interest in the estate; for some aliquot part as it is sometimes expressed; that is for a specific share, as tenancy in common or joint tenancy, or one-half, one-quarter or other particular fraction of the whole; or for a particular interest, as a life estate or tenancy for years, or remainder in the whole; and that a general contribution of a sum of money towards the entire purchase is not sufficient."

McGowan *vs.* McGowan, 14 Gray, 119.

See, also, Bailey *vs.* Hemenway, 147 Mass. 326.

Sayre *vs.* Townsend, 15 Wend. 651.

"Where the purchase-money is all paid by one and the property is conveyed to another, there is a resulting trust in favor of the party paying, unless there be something which takes the case out of the operation of the general rule. But where he furnishes only a part of the amount paid no trust arises unless his part is some definite portion of the whole, and is paid for some aliquot part of the property as a fourth, a third or a moiety. There must be no uncertainty as to the proportion of the property to which the trust extends. . . . Such a trust must arise, if at all, at the time the purchase is made. The funds must then be advanced and invested. It can not be created by after advances or funds subsequently furnished. It does not arise upon subsequent payments under a contract by another to purchase. *A trust to the extent of the payment made would not support the case made in the bill. The complainant claims to have owned the entire estate.*"

Olcott *vs.* Bynum, 17 Wall. 59–60.

"While there is no doubt of the general proposition that a trust results to him who pays the consideration for an estate where the title is taken in the name of another; that such trust is not within the statute, and that parol evidence is admissible to show whose money was actually paid for the property, it is equally clear that the trust must have arisen at the time the purchase was made, and that the whole consideration must have been paid or secured at the time of or prior to the purchase. *Olcott* v. *Bynum*, 17 Wall. 44; *White* v. *Carpenter*, 2 Paige, 217, 241; *Buck* v. *Swazey*, 35 Me. 41; 1 Perry on Trusts, Sec. 133; 2 Pom. Eq. Jur., Sec. 1037. But, as before stated, parol evidence is competent to prove that the consideration actually moved from the *cestui que trust*. *Boyd* v. *McLean*, 1 Johns. Ch. 582; *Baker* v. *Vining*, 30 Me. 121; *Whitmore* v. *Larned*, 70 Me. 276; *Page* v. *Page*, 8 N. H. 187, 195; 2 Pom. Eq. Jur., Sec. 1040. It follows that the bill of complaint should show, without ambiguity or equivocation, that the whole of the consideration appropriate to that share of the land which the plaintiffs claim, by virtue of such payment, was paid before the deed was taken. Tested by these rules, we think the claimants have failed to make out their case with the clearness which the law demands."

Ducie *vs.* Ford, 138 U. S. 592.

Chancellor Kent says, in Parkhurst *vs.* Van Courtlandt, 1 Johns. Ch. 281:

> "I am warranted in considering it a settled principle that if the court can not ascertain with reasonable certainty the terms of the agreement from the writing, or from some other paper to which it refers, the writing does not take case out of the statute."

The same rule would apply with greater force to such a case as this where from the writing produced the fact that there was any agreement of the kind claimed by appellee Buck can not be ascertained "with reasonable certainty;" and where from the writing it can be ascertained "with rea-

sonable certainty" that there was in fact no such agreement as a part of the original transaction.

"It appears to be equally well settled," he says in the same case—

> "that when the agreement is thus defective, it can not be supplied by parol proof, for that would be at once to open the door to perjury, and to introduce all the mischiefs which the Statute of Frauds and Perjuries was intended to prevent."

We submit that it is a singular, not to say a suspicious, circumstance that while Buck had access to all of the papers and effects of Charles F. Brainard, after the latter's death, and that they came into his (Buck's) possession after the death of Mrs. Brainard, he has not produced a single letter written by him to Brainard nor produced a single letter written by Brainard to him to enlighten the exact nature of the pecuniary relations between them, although he admits receiving such letters (Rec., p. 28); his statement that he made no entry or memorandum and kept no account of amounts sent Brainard, or of the purposes for which sent, is improbable, especially in view of the fact that he kept a diary in which he says he entered less important matters (Rec., bottom of page 34). It is inconceivable that of important matters such as Buck alleges in his original bill, or such as he alleges in his amended bill, or such as he testifies to in his deposition, there should not be a vestige of evidence left more conclusive in support of his pretensions than that afforded by the entries in Brainard's memorandum book, and by those in the overture for settlement.

The Question of Laches.

Laches can not be attributed to the appellants, but should be to the appellee, Buck, under the circumstances disclosed; as the situation appeared to them respectively the former acted with diligence and good faith, the latter did not.

The legal title is shown by the land records to have been in Charles F. Brainard, and he was in possession at the time of his death; these facts were known to appellee Buck for seventeen years prior to the institution of his suit; the widow is permitted to continue in occupation; she had not color of title and her occupation was the possession of appellants; the occupation could not become adversary until some notice of the fact was brought home to appellants; this was not done during her lifetime; certainly Buck's unrecorded deed, the existence of which was unknown to appellants, did not constitute such notice; they did not become aware of her death for some years after it occurred; down to the time of her death there was no visible manifestation of an adverse holding; from this time only could the statute begin to run; after learning that Coleman was in possession and claiming adversely, the adult appellant seasonably invoked his remedy.

How different is the light in which appellee Buck appears; he knew everything that appellant knew in regard to the condition of the record title, and in addition he knew other things which appellant did not know, and among them the fact that he had obtained a deed from Mrs. Brainard in 1882, the existence of which he was concealing by keeping it from the public records; if this deed had been recorded it would have been color of title to Buck; it was executed and delivered in March, 1882, but it was not recorded either during Mrs. Brainard's lifetime or since her death nor brought to light until in its unrecorded state, it was attached in 1898 as an exhibit to appellees' bill. Why?

Can any other reason be assigned for the omission than his fear, that if recorded it might attract the attention of Brainard's heirs, and result in their taking possession of the property if vacant, or in the institution of a suit by them for its recovery, if occupied.

He knew before Brainard's death that the legal title was in Brainard, and that upon his death it passed to his heirs unaf-

fected by the will filed as an exhibit to his alleged bill, and which purports to have been made seven years before it was acquired; he knew during Brainard's lifetime and after his death that against a purchaser in good faith he could not prevail; he knew that if his claims and pretensions were well founded an equity court would establish them; and that until this was done he must remain in the eye of the law a stranger to the title, a mere trespasser, and that the interest claimed by him must remain valueless.

That he did not act at once under the influence of such important and strongly persuasive considerations and invoke the aid of the court, but waited for seventeen years before doing so, and then only after proceedings had been instituted by the legal owner to enforce his right of possession, is a fact characteristic neither of good faith nor diligence.

If appellee Buck ever had the rights asserted in any one of his contradictory claims, his present predicament is due entirely to his own failure to act with diligence in their enforcement; he shows no meritorious reason why an equity court should at this late date relieve him.

The doctrine of Ruckman *vs.* Cory, 129 U. S. 397, was never intended to apply to such a case.

> "Lapse of time and the death of the parties to the deed have always been considered in a court of chancery, entitled to great weight, and almost controlling circumstances in cases of this kind;"

that is, when the controversy grows out of stale transactions.

Jenkins *vs.* Pye, 12 Pet. 254.

> "In all cases where actual fraud is not made out, but the imputation is upon conjecture, where the seal of death has closed the lips of those whose characters are involved, and lapse of time has impaired the recollection of the transaction and obscured the details, the welfare of society demands the rigid enforcement of the rule of diligence."

Hammond *vs.* Hopkins, 143 U. S. 224.

If the case, as it appears at the hearing, is liable to the objection of staleness—

> "by reason of the *laches* of the complainants the court will, upon that ground, be passive and refuse relief."
>
> Richards *vs.* Mackall, 124 U. S. 187.

> "Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting the court is passive and does nothing."
>
> Lord Camden in Smith *vs.* Clay; quoted with approval in Speidel *vs.* Henrici, 120 U. S. 387, and in Brown *vs.* County of Buena Vista, 95 U. S. 157.

The complainants, we contend, have utterly failed to make out any case entitling them to relief; that they have, in the language or the court in Ducie *vs.* Ford, *supra*, "failed to make out their case with the clearness and certainty which the law demands" seems beyond question.

Divested of imputations of fraud, based upon unproved averments of fact in respect of the circumstances attending the execution of the deed to Brainard, the case of appellees is reduced to a naked request preferred to an equity court by a party merely in possession of property, that another invested with the legal title and a right to the possession, shall be deprived of his privilege to sue for its recovery.

The Third Assignment of Error.

While, under the well-established rules of equity procedure, we believe that the reasons given in support of our first and second assignments of errors are conclusive against the decree which gives the entire property to appellee Buck and divests Brainard's heirs of all interest in it, as specifically prayed in the amended bill, nevertheless we

submit that in no possible view of the evidence, even upon a proper bill, could Buck be properly held to be entitled, as a matter of equitable right, to more than a decree for an accounting wherein he should be credited with advances of money made by him to Brainard in the latter's lifetime and invested by the latter in the property, and further credited with the sum paid by him after Brainard's death in the settlement of Brainard's debt to the building association secured by the deed of trust (thus subrogating him to the rights of the association), and charged with rents and other proper offsets, and with an equitable lien on the property for the balance thus found to be due, if any.

Or, on the other hand, to a decree for an undivided moiety of the property and for an accounting in like manner, wherein he should be credited with any sums of his money invested by Brainard in the purchase of the property, over and above one-half of the purchase-money, including therein the debt to the building association, and .charged with rents and other proper offsets, with an equitable lien upon the remaining moiety of the property for the balance thus found to be due, if any.

The first suggestion accords with the fact that Brainard, in his lifetime, used of Buck's money in paying on the purchase-money of the property ($3,816), and allows him to be subrogated to the rights of the building association for the payment made to it after Brainard's death, Buck having no legal or equitable title to the whole or an aliquot part of the property.

The latter suggestion accords with his, Buck's, last representation (that given in his deposition) if not with the ones made in his bills, as to the property.

He testifies (Rec., p. 28):

> "About 1878, as I had no settled home, *I suggested to him that we should buy a house together* in Washington, for my part as headquarters and to be a

home for himself and his wife. . . . *After we had talked about several different houses we finally decided to buy the house 1632 Rhode Island aaenue*, which Mr. Brainard wrote me could be obtained for $6,350 . . . I replied *that if he was satisfied the house was worth the money and would be a pleasant place to live that he should buy it—I to pay one-half; he the other half.*"

And further (Rec., p. 29):

> "When we agreed to buy the house together I supposed it would be in the name of both. Along early in 1880, I learned that the property had been bought in his name alone. In the summer of 1880, I spoke to him about it, and told him that if he would transfer the property to me in my name I would pay for the balance, and he could have it for his home. I *understood—in fact, he told me*—that when he recovered (he was sick at the time) that he would be able to go and pay the balance on the house, *and would be able to pay me for my part of it*, and own it in his own name, and he thought that would be better than to go to the expense of two transfers."

To this he says he agreed (Rec., p. 35).

Later, and between September 4 and September 16, 1880, as we have seen, he states that Brainard gave him the "Memd. Basis for Settlement" proposing to convey to him an undivided half of the property, and which was acted upon by Brainard as accepted, as shown by the opening by him, Brainard, of an account with one-half of the property.

This put the arrangement between Brainard and Buck in precisely the situation claimed by Buck in his deposition, as the proper one, in so far as equality of title was concerned, and treating the account thus opened by Brainard as a memorandum in writing would avoid the Statute of Frauds and allow the agreement to be enforced.

The failure to make the deed would be immaterial upon the principle that equity would consider that as having been done which ought to have been done, in adjusting the rights of the parties.

Brainard's heirs stand in the same relation to the property that Brainard himself would have stood in were he alive, and to hold under the circumstances, that they shall be deprived of all interest in the property is most inequitable and unjust.

According to the "Memd. Basis for Settlement," which must be taken as a final settlement of their pecuniary relations and as a correct one—for Buck introduces and relies upon it—and he advanced no money to Brainard after it was delivered by Brainard to him in September, 1880—it states the entire indebtedness af Brainard to him at that time as $3,816, and so remained the debt at the time of Brainard's death.

In 1882, and a few months after Brainard's death, he paid off the debt to the building association, obtained a deed from Mrs. Brainard and took possession of the property; and he has since had the entire control and use of it; he permitted her to occupy it until her death, and for ten years past he has collected rent from it at the rate of $65 per month and he got Brainard's furniture after the widow's death.

The whole amount of his money put into the property in Brainard's lifetime was $3,816, and he paid off the building association debt of $1,971, after Brainard's death, making the sum total of his moneys applied to paying for the property nearly $600 short of the purchase-money which was paid by Brainard.

Buck took no personal risk or obligation whatsoever as to deferred payments of purchase-money, **and if the house had been destroyed by fire or depreciated**

in value, Brainard alone would have been responsible for the portion unpaid.

The property, however, has greatly increased in value, being now worth about $15,000, and an affirmance of the decree would, we respectfully insist, be tantamount to a gift of it to Buck, after he has been reimbursed in full for all just claim which he had against it.

He declares in his deposition that the agreement between himself and Brainard was for the acquisition of an equal interest, each to contribute equally to the purchase-money, and even if the fact were that Brainard had improperly applied Buck's funds to the payment of the whole of the purchase-money a claim on his part to the whole of the property should not be allowed.

As to this the case of Dickson *vs.* Patterson, 160 U. S. 584, is directly in point; there the court held that if two persons agree to buy property jointly, and even if through the fraud of one of them, in misrepresenting the amount of the purchase-money, the other is induced to advance the whole, the defrauded party is not entitled to the whole of the property, but only to one-half according to the agreement, and to a lien upon the other's share paid over and above one-half of the actual cost, and that an accounting should be had between the parties.

Before closing this brief some reference is proper to the opinion of the court below.

The learned judge who delivered the opinion is certainly mistaken when he says (Rec., p. 82):

> "Buck says he did not accept the agreement, but let matters run on because of Brainard's nervous condition and because he expected the will of Brainard would vest the legal title in his sister."

Buck did not testify that he did not accept the proposition of Brainard in the "Memd. Basis of Settlement;" he

did not testify that he let matters run on account of Brainard's ill-health. What he said in reference to Brainard's ill-health had relation to a different matter; that is, his own proposition to Brainard in the summer of 1880 and before the "Memd. Basis of Settlement" was delivered to him, that if Brainard would transfer the property to him he would pay off the incumbrance, which proposition Brainard declined, saying, as Buck testifies (Rec., p. 29), that when he, Brainard, recovered he would be able to pay off the incumbrance, and also to pay Buck for his half; and Buck testifies (Rec., p. 35) that he *agreed* to this, being induced thereto by the condition of Brainard's health, but agreeing to it nevertheless; nor did he testify that he let matters run on because of his expectation that the will of Brainard would vest the legal title in his, Buck's, sister.

What he testified in regard to the will is as follows (Rec., p. 30):

> "Q. Do you remember anything about a will?
>
> "A. *I do not know anything about a will*, except that I have an impression, as I believe I stated before, that whatever property he had would go to his wife.
>
> "Q. Did he say anything about a will at the time? (referring to the time he and Brainard talked about the property).
>
> "*No, he did not say anything* about a will that I heard of."

The learned judge (Rec., p. 81) states that there was evidence showing that Brainard had lost money through the failure of a building association. Buck, to be sure, says (Rec., p. 30), that Brainard had told him so, but Brainard's brother testifies (Rec., p. 44), that he and his brother were interested in a building association which had failed, and that neither of them had lost anything by the failure, as they had withdrawn from it seven years before the house was bought; the entries in Brainard's book shows that he

received considerable sums, not loans, from such associations (Rec., pp. 8, 9), in the fourteen months preceding his (Brainard's) death.

If under the prayer for general relief it was proper to give Buck any relief at all, it should have been to the extent, only, indicated in one or the other of the alternatives suggested.

With due deference we submit that the conclusions reached by the court are based upon a misapprehension of the facts in the case and their true import.

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